

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

CENTRAL ILLINOIS LIGHT COMPANY)	
D/B/A Ameren/CILCO)	
)	No. 05-0160
Proposal to implement a competitive procurement)	
Process by establishing Rider BGS, Rider BGS-L,)	
Rider RTP, Rider RTP-L, Rider D, and Rider MV)	
)	
CENTRAL ILLINOIS PUBLIC SERVICE COMPANY)	
d/b/a AmerenCIPS)	
)	No. 05-0161
Proposal to implement a competitive procurement)	
Process by establishing Rider BGS, Rider BGS-L,)	
Rider RTP, Rider RTP-L, Rider D, and Rider MV)	
)	
ILLINOIS POWER COMPANY)	
d/b/a AmerenIP)	
)	No. 05-0162
Proposal to implement a competitive procurement)	
Process by establishing Rider BGS, Rider BGS-L,)	
Rider RTP, Rider RTP-L, Rider D, and Rider MV)	

**MOTION TO DISMISS
BY THE PEOPLE OF THE STATE OF ILLINOIS,
THE CITIZENS UTILITY BOARD, AND
THE ENVIRONMENTAL LAW AND POLICY CENTER**

Pursuant to 83 Ill. Admin. Code 200.190, the People of the State of Illinois, by Lisa Madigan, Attorney General of the State of Illinois; the Citizens Utility Board, and the Environmental Law and Policy Center, by and through their attorneys, hereby file this Motion to Dismiss the portion of this proceeding relating to Riders BGS, BGS-L, D and MV, which have been proposed by AmerenCILCO, AmerenCIPS, and AmerenIP (collectively, "Ameren") in the above-referenced dockets. In support thereof, we state as follows:

I. INTRODUCTION

Riders BGS, BGS-L, D and MV describe an auction-based procurement and pricing process, which Ameren plans to use to impose market-based electric rates on "captive" residential, commercial and industrial customers, in violation of consumer

protection provisions in the Public Utilities Act (“PUA” or “the Act”). 220 ILCS 5 et seq. Therefore, we request that the Illinois Commerce Commission (“ICC” or “Commission”) dismiss Ameren’s request for approval of the market-based rates described in Riders BGS, BGS-L, D and MV.

II. HISTORY OF THE PROCEEDING

On February 28, 2005, Ameren filed¹ the above-referenced tariffs with the Commission. Several of these tariffs (including Riders BGS, BGS-L, D and MV) propose market-based rates for Ameren’s retail customers.

On March 9, 2005, the Commission opened docket nos. 05-0160, 05-0161 and 05-0162 to investigate “the propriety of the proposed tariff sheets” and suspended Riders BGS, BGS-L, D and MV, as well as the other tariffs proposed by Ameren. *Suspension Order, ICC Docket No. 05-0160, Suspension Order, ICC Docket No. 05-0161, Suspension Order, ICC Docket No. 05-0162, March 9, 2005.*

On April 8, 2005, the Administrative Law Judge (“ALJ”) announced his ruling consolidating docket numbers 05-0160, 05-0161, 05-0162. *Prehearing Conference, ICC Docket Nos. 05-0160, 05-0161, 05-0162 (April 8, 2005).*

On April 22, 2005 the ALJ issued a Scheduling Order for this docket. The Scheduling Order requires that Commission Staff and Intervenors submit direct testimony by June 15, 2005 and submit rebuttal testimony on August 10, 2005. Hearings are scheduled to begin on September 6, 2005. *Scheduling Order at 2, ICC Docket Nos. 05-0160, 05-0161, 05-0162 (cons.), April, 22, 2005.*

¹ A “Supplemental Statement” filed in connection with the tariffs states that they were “filed pursuant to Article IX, just as envisioned by the statute.” *Supplemental Statement, ICC docket nos. 05-0160, 05-0161, 05-0162 (February 28, 2005) p. 6.*

In light of this schedule, we seek expedited consideration of this motion to avoid unnecessary use of resources on aspects of this proceeding that the Commission lacks statutory authority to review.

III. AMEREN SEEKS APPROVAL FOR UNLAWFUL MARKET- BASED RATES FOR CUSTOMERS WHO TAKE BUNDLED SERVICE

Riders BGS, BGS-L, D and MV describe an auction-based process that Ameren plans to use, starting in 2007, to procure and price electricity to serve over one million jurisdictional customers in the Ameren service territory.² Ameren seeks Commission approval to use the clearing prices established in the auction and various formulae³ presented in Rider MV to automatically set market-based rates for retail customers – without any subsequent substantive review by the Commission to determine whether these rates are just and reasonable.⁴ Ameren would charge these market-based rates to residential, commercial and industrial customers who take bundled service from Ameren. *AmerenCILCO Riders BGS, BGS-L, D and MV, ILL. C.C. No. 18, Original Sheet Nos. 22 et seq., 23 et seq., 26 et seq. and 27 et seq.; AmerenCIPS Riders BGS, BGS-L, D and MV, ILL. C.C. No. 16, Original Sheet Nos. 22 et seq., 23 et seq., 26 et*

² Ameren proposes a “Competitive Procurement Auction Process” which “employs auctions through which . . . market-based pricing for electric power and energy supply is determined . . .” *Rider MV – Market Value of Power and Energy, filed by Central Illinois Light Company d/b/a AmerenCILCO with the Illinois Commerce Commission on February 28, 2005, ILL. C.C. No. 18, Original Sheet No. 27.010; Rider MV – Market Value of Power and Energy, filed by Central Illinois Public Service Company d/b/a AmerenCIPS with the Illinois Commerce Commission on February 28, 2005, ILL. C.C. No. 16, Original Sheet No. 27.010; Rider MV – Market Value of Power and Energy, filed by Illinois Power Company d/b/a AmerenIP with the Illinois Commerce Commission on February 28, 2005, ILL. C.C. No. 35, Original Sheet No. 27.010; ICC docket nos. 05-0160, 05-0161 and 05-0162 (cons.).*

³ Ameren states that: “The Company determines retail charges for electric power and energy supply based upon the results of the auctions using formulae provided in the Translation to Retail Charges part of this rider and provides such charges to the ICC in the form of an informational filing.” *AmerenCILCO Rider MV, ILL. C.C. No. 18, Original Sheet No. 27.011; AmerenCIPS Rider MV, ILL. C.C. No. 16, Original Sheet No. 27.011; AmerenIP Rider MV, ILL. C.C. No. 35, Original Sheet No. 27.011.*

⁴ The PUA requires rates charged by electric utilities to be “just and reasonable.” 220 ILCS 5/9-101.

seq. and 27 et seq.; AmerenIP Riders BGS, BGS-L, D and MV, ILL. C.C. No. 35, Original Sheet Nos. 22 et seq., 23 et seq., 26 et seq. and 27 et seq.; ICC Docket Nos. 05-0160, 05-0161, 05-0162 (cons.)

Ameren's direct testimony in this proceeding confirms that the auction proposed in Riders BGS, BGS-L, D and MV is designed to bring market-based rates to Ameren's retail customers. Indeed, Warner L. Baxter, Executive Vice President and Chief Financial Officer for Ameren Corporation states that ". . . rates should reflect market prices." *AmerenCILCO, AmerenCIPS, and AmerenIP, Ex.1.0, p. 3; ICC Docket Nos. 05-0160, 05-0161, 05-0162 (cons.), emphasis added.*

IV. THE PUA AUTHORIZES MARKET-BASED RATES ONLY FOR CUSTOMERS WITH ELECTRIC SERVICE THAT HAS BEEN DECLARED COMPETITIVE

The PUA authorizes the Commission to approve market-based rates for customers who take electric service that has been "declared competitive" pursuant to § 16-113 of the Act. At present, no Ameren customers receive service that has been "declared competitive." Consequently, all Ameren customers are entitled to cost-based rates, which protect consumers from charges in excess of the actual costs of providing electric service. The 1997 PUA amendments did not disturb long-standing protections for consumers who lack access to competitive retail markets. Riders BGS, BGS-L, D and MV, therefore, violate the PUA because they would impose market-based rates on Ameren's captive customers.

A. The PUA has required electric rates to be "just and reasonable" and based on cost-of-service for nearly a century.

The PUA requires rates charged by electric utilities to be "just and reasonable." *220 ILCS 5/9-101.* The PUA also specifies that "tariff rates for the sale of various public utility services are authorized such that they accurately reflect the cost of delivering those services and allow utilities to recover the total costs prudently and reasonably incurred." *220 ILCS 5/1-102 (a)(iv), emphasis added.* "In setting rates, the

Commission must determine that the rates accurately reflect the cost of service delivery and must allow the utility to recover costs prudently and reasonably incurred.” Citizens Utility Board v. Illinois Commerce Commission et al., 166 Ill.2d 111, 121, 651 N.E.2d 1089, 1095 (Ill. 1995), citation omitted.

For almost a century, the Commission has applied these standards to determine whether proposed tariffs contain just and reasonable rates based on prudently incurred costs. Ameren’s proposed Riders BGS, BGS-L, D and MV attempt to replace cost-based rates with market-based rates that would be set automatically by an auction, without any subsequent substantive review by the Commission to determine whether these rates are prudent, just and reasonable. Hence, Ameren’s proposal attempts to circumvent essential consumer protection provisions in the PUA.

B. The 1997 amendments to the Public Utilities Act authorize market-based rates only for customers who take service that has been declared competitive.

In 1997, the Public Utilities Act was amended by the “Electric Service Customer Choice and Rate Relief Law of 1997.” P.A. 90-561, codified at 220 ILCS 5/16. The 1997 amendments highlight the potential benefits of effective competition, but also emphasize the need for continuing consumer protection:

Competitive forces are affecting the market for electricity as a result of recent federal regulatory and statutory changes and the activities of other states. . .

A competitive wholesale and retail market must benefit all Illinois citizens. The Illinois Commerce Commission should act to promote the development of an effectively competitive electricity market that operates efficiently and is equitable to all consumers. Consumer protections must be in place to ensure that all customers continue to receive safe, reliable, affordable, and environmentally safe electric service.

220 ILCS 5/16-101A(b) and (d).

As noted in these legislative findings, the 1997 PUA amendments were enacted in the wake of “federal regulatory and statutory changes” 220 ILCS 5/16-101A(b). One such change was a 1996 Federal Energy Regulatory Commission

("FERC") rule that allows wholesale electric suppliers in competitive markets to charge market-based rates. 18 CFR § 35.27, Order 888, 61 FR 21693, May 10, 1996. Since then, FERC has approved⁵ applications for market-based rates, in lieu of rates based on cost-of-service, for competitive wholesale markets. Louisiana Energy and Power Authority v. FERC, 141 F.3d 364, 365; 329 U.S.App.D.C. 401, 402 (1998).

The 1997 PUA Amendments appear to adapt FERC's approach in competitive wholesale markets to competitive retail markets:

. . . For those components of the service which have been declared competitive, cost shall be the market based prices. Market based prices as referred to herein shall mean, for electric power and energy, either (i) those prices for electric power and energy determined as provided in Section 16-112, or (ii) the electric utility's cost of obtaining the electric power and energy at wholesale through a competitive bidding or other arms-length acquisition process.

P.A. 90-561 § 103(c), codified at 220 ILCS 5/16-103(c). This amendatory language expressly authorizes market-based rates for customers who take service that has been declared competitive⁶ pursuant to section § 16-113 of the PUA. 20 ILCS 5/16-113. At present, only very large (over 3 megawatt) commercial and industrial customers in ComEd's service territory – but none in Ameren's service territory -- receive service that has been "declared competitive." *Commonwealth Edison Company Petition for declaration of service currently provided under Rate 6L to 3 MW and greater customers*

⁵ "FERC is obligated to ensure that wholesale power rates are 'just and reasonable'" whether the rates are set by the market or through the regulatory process. California v. FERC, 383 F.3d 1006, 1011, (9th Cir. 2004), petition for reh'g pending, No. 02-73093 (9th Cir. Oct 25, 2004).

⁶ The competitive declaration provision was enacted as part of the 1997 amendments and provides that:

The Commission shall declare the service to be a competitive service for some identifiable customer segment or group of customers, or some clearly defined geographical area within the electric utility's service area, if the service or a reasonably equivalent substitute service is reasonably available to the customer segment or group in the defined geographical area at a comparable price from one or more providers other than the electric utility, or an affiliate of the electric utility, and the electric utility has lost or there is a reasonable likelihood that the electric utility will lose business for the service to the other provider or providers...

P.A. 90-561 § 113(a), codified at 220 ILCS 5/16-113.

as a competitive service pursuant to Section 16-113 of the Public Utilities Act and approval of related tariff amendments, ICC docket no. 02-0479; March 28, 2003; reh'g denied, April 28, 2003; aff'd, March 24, 2004 (Ill App Nos. 1-03-0263 and 1-03-1706 (cons)).

C. The 1997 Amendments to the Public Utilities Act do not authorize the ICC to abandon cost-based ratemaking for households and businesses that do not have access to competitive service.

Nothing in the 1997 PUA Amendments authorizes the Commission to approve market-based rates for customers served exclusively by a regulated utility – customers who, by definition, do not have access to competitive service. To the contrary, the PUA specifically states that these customers are entitled to continue receiving the same service that was offered to customers before the 1997 amendments until such time as service to these customers is “declared competitive” by the Commission:

[E]ach electric utility shall continue offering to all residential customers and to all small commercial retail customers in its service area, as a tariffed service, bundled electric power and energy delivered to the customer's premises consistent with the bundled utility service provided by the electric utility on the effective date of this amendatory Act of 1977.

220 ILCS 5/16-103(c). Providing bundled utility service “consistent with the bundled utility service as of 1997” means service based on the same standards that were in place prior to 1997: service provided at just and reasonable rates based on the utility's prudently incurred costs.

These consumer protections, which have been in place for almost a century, ensure that electric rates for a utility's captive customers are based on the actual cost of providing service – and no more. State Public Utilities Comm'n v. Springfield Gas & Electric Co., 291 Ill. 209, 217-18; 125 NE 891, (1919) (the public is entitled to demand that no more be exacted from it than the services rendered are reasonably worth). For customers who lack competitive choices, the PUA retains the longstanding focus on

costs determined through regulatory review rather than prices determined by the market. Like FERC, the ICC cannot approve market-based rates in markets that are not competitive. *Louisiana Energy*, at 365.

V. THE COMMISSION LACKS AUTHORITY TO APPROVE MARKET-BASED RATES FOR CUSTOMERS WHOSE SERVICE HAS NOT BEEN DECLARED COMPETITIVE

The Commission's authority is limited to that provided by Illinois law. It is well-established that "... the sole power of the Commission comes from the statute [PUA] and ... it has power and jurisdiction only to determine facts and make orders concerning the matters specified in the statute." *Lowden v. Illinois Commerce Com.* 376 Ill. 225, 230, 33 N.E.2d 430 (1941). As a result of the 1997 Amendments to the PUA, this grant of authority has been expanded to allow the Commission to approve market-based rates for customers who take electric service that has been declared competitive. 220 ILCS 5/16-103(c).

The PUA does not, however, grant the Commission authority to approve market-based rates for customers who take service that has not been declared competitive.⁷ See, pp. 2-7, *supra*. If the General Assembly had intended to authorize market-based prices for customers who do not have competitive choices, the General Assembly could have explicitly done so. It did not; instead, it retained the consumer protection provisions that have been in place for nearly a century to protect captive customers.

⁷ Although the PUA does not authorize market-based rates for customers who do not have access to competitive service, the 1997 amendments do direct the Commission to compare cost-based rates proposed for these customers with the "market value" of electricity when determining whether the proposed rates are just and reasonable. 220 ILCS 5/16-111(i). If the cost-based rate for power and energy exceeds market value, the 1997 amendatory language provides that the Commission "may establish such electric power and energy component at a rate equal to the market value plus 10%." 220 ILCS 5/16-111(i), *emphasis added*. By adding this check on cost-based rates, the 1997 amendments ensure that all consumers, even those who do not yet have a choice of electricity suppliers, can compare their rates with the prices that might be produced if they were served by a competitive market.

The Commission, therefore, lacks authority to approve the market-based rates in Riders BGS, BGS-L, D and MV. None of the customer groups covered by these tariffs take electric service that has been or could be declared competitive pursuant to § 16-113 of the PUA. The residential, commercial and industrial customers covered under these tariffs⁸ are served exclusively by Ameren. In Ameren's service territory, consumers have not experienced the "choices among suppliers and services" and benefits from competition that were anticipated in the 1997 Amendments to the PUA:

All consumers must benefit in an equitable and timely fashion from the lower costs for electricity that result from retail and wholesale competition and receive sufficient information to make informed choices among suppliers and services. The use of renewable resources and energy efficiency resources should be encouraged in competitive markets.

220 ILCS 5/16-101A(e), emphasis added.

The Commission also lacks authority to pre-approve the rates described in Riders BGS, BGS-L, D and MV. If the Commission were to allow Riders BGS, BGS-L, D and MV to go into effect, electric rates would be set automatically through the auction process. The Commission cannot approve the process proposed in Riders BGS, BGS-L, D and MV without abdicating its duty to enforce consumer protection provisions in the PUA which require: (a) rates based on cost of service; (b) a determination as to whether the costs were prudently incurred; and (c) review of the justness and reasonableness of the rates. The Commission does not have discretion to conduct an *ultra vires* review of a tariff that, on its face, fails to comply with the legal requirements specified in the PUA.

⁸ AmerenCILCO Riders BGS, BGS-L, D and MV, ILL. C.C. No. 18, Original Sheet Nos. 22 et seq., 23 et seq., 26 et seq. and 27 et seq.; AmerenCIPS Riders BGS, BGS-L, D and MV, ILL. C.C. No. 16, Original Sheet Nos. 22 et seq., 23 et seq., 26 et seq. and 27 et seq.; AmerenIP Riders BGS, BGS-L, D and MV, ILL. C.C. No. 35, Original Sheet Nos. 22 et seq., 23 et seq., 26 et seq. and 27 et seq.; ICC Docket Nos. 05-0160, 05-0161, 05-0162 (cons.).

VI. THE COMMISSION SHOULD DISMISS AMEREN'S REQUEST FOR APPROVAL OF THE MARKET-BASED RATES IN RIDERS BGS, BGS-L, D AND MV

The Commission does not have authority to approve the rates described in Riders BGS, BGS-L, D and MV because the Commission does not have authority to approve market-based rates for customers that have not been declared competitive. Ameren's attempt to impose market-based rates on captive customers must be rejected, as a matter of law. The Commission should, therefore, dismiss Ameren's request for approval of the market-based rates in Riders BGS, BGS-L, D and MV.

VII. CONCLUSION

For the foregoing reasons, the People of the State of Illinois, the Citizens Utility Board and the Environmental Law and Policy Center respectfully request that the Commission dismiss Ameren's application for approval of the market-based rates in Riders BGS, BGS-L, D and MV because the Commission does not have legal authority to approve market-based rates for customers that have not been declared competitive pursuant to § 16-113 of the PUA. We seek expedited consideration of this motion, in order to avoid unnecessary use of resources on aspects of this proceeding that the Commission lacks statutory authority to review.

Respectfully submitted,

**The People of the State of Illinois, by and
through LISA MADIGAN,
Illinois Attorney General**

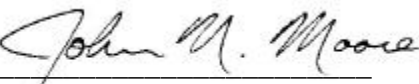
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